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No. 82-1482

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,

Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT THE GREAT-WEST LIFE ASSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. D. FLEMING, JR.
Counsel of Record for Respondent
The Great-West Life Assurance
Company

SUTHERLAND, ASBILL & BRENNAN
3100 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-8700

QUESTION PRESENTED

Should this Court review a decision by the United States Court of Appeals for the Eleventh Circuit affirming a District Court's holding that the provisions of an employee benefit plan covered by ERISA and maintained by the Respondents were contained in more than one document, where all of the provisions in question were in writing, were agreed upon the contracting parties, and were intended to be part of the plan?

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BRIEF OF RESPONDENT THE GREAT-WEST LIFE ASSURANCE COMPANY* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The Great-West Life Assurance Company (hereinafter "Great-West") respectfully requests

* In accordance with Rule 28.1, The Great-West Life Assurance Company shows that its parents, subsidiaries and affiliates are: The Great-West Life Annuity Insurance Company and Vesma Services, Incorporated (both U.S. corporations) and the

that this Court deny the petition for writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Eleventh Circuit, affirming without opinion the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, in *Myron v. Trust Company Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511 (1981); *aff'd*, 691 F.2d 510 (11th Cir. 1982).

OPINION AND JUDGMENT BELOW

The judgment of the Court of Appeals and the opinion of the District Court below are accurately identified in the petition, and are reproduced on pages A-2 through A-41 of the Appendix to the petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No statutes or constitutional provisions not identified in the petition are involved in this case.

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following Canadian entities: Gold Circle Insurance Company; Place Bonaventure, Inc.; Place Bonaventure [South], Inc.; Cambridge Leaseholds, Ltd.; River East Developments, Ltd.; Torwest Properties, Ltd.; The Investors Group; and Power Corporation of Canada.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below.

Petitioner, Harold L. Myron, filed this action in August 1980 against Respondents Trust Company Bank ("Trust Company"), Trust Company Bank Long-Term Disability Benefit Plan ("the Plan"), and Great-West Life Assurance Company ("Great-West"). Petitioner, an ex-employee of Trust Company, sought to recover from Respondents monthly benefits under the Plan in the amount of $1,284.50, plus attorneys' fees and certain statutory damages under the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, *et seq.*). Respondents answered denying the above-described allegations. Subsequently, Petitioner amended his complaint to increase his claim for monthly benefits to the amount of $1,770.

Following the completion of discovery, Respondents each moved for summary judgment. Petitioner responded to those motions by filing his own motion for summary judgment. On September 16, 1981, the Honorable Orinda Evans of the United States District Court for the Northern District of Georgia entered an order granting each respondent's motion for summary judgment and denying Petitioner's motion. Judgment was entered in accordance with that order, and Petitioner appealed to the Eleventh Circuit. After receiving briefs and hearing oral argument, the Eleventh Circuit Court of Appeals affirmed the District Court's judgment without opinion pursuant to Circuit Rule 25 (reproduced at A-1 of Appendix to petition) and subsequently denied Petitioner's motion for rehearing.

II. Statement of Facts

Petitioner served in the military for thirty years and retired from the United States Army as a full Colonel in June 1973. From July 1973 through August 1, 1979 Petitioner was employed by Respondent Trust Company. He retired from Trust Company due to total and permanent disability effective August 1, 1979. At the time of his retirement, Petitioner's basic salary with Trust Company was $35,400 per year.

Petitioner had been receiving military retirement pay since August 1, 1973. Effective April 1, 1978, he became eligible for and began to receive disability benefits from the Veterans Administration ("VA"). Effective September 1, 1979, Petitioner became eligible to receive 100 percent service-connected VA disability payments. Both the military retirement and the VA disability benefits increased between the time of Petitioner's original eligibility and the filing of the complaint in this action. Effective January 1, 1980, Petitioner also began receiving Social Security benefits in the amount of $485.50 per month. As of March 31, 1981, Petitioner was receiving VA disability, Social Security disability, and military retirement pay totaling at least $3,875 per month or at least $46,500 per year.

At all times relevant to this action, Respondent Trust Company sponsored for its employees a long-term disability benefit plan. From July 15, 1975 through April 30, 1979, the Plan was funded through an employee group long-term disability income insurance policy with Northwestern National Life Insurance Company ("Northwestern").

In September of 1978, Respondent Great-West submitted to Johnson & Higgins of Georgia, Inc. (an insurance consulting firm) a proposal containing its funding recommendation for a long-term disability benefit plan for Trust Company. The basic provisions of this proposal were eventually accepted by Trust Company as of May 1, 1979. Effective May 1, 1979, Trust Company contracted with Great-West to convert the funding of the Plan to a self-funded program with claims adjudication and fund management services to be provided by Great-West.

At the time the agreement was reached between Trust Company and Great-West to replace the Northwestern policy with Great-West's self-funding mechanism on May 1, 1979, no document (or even a draft of a document, other than the original proposal submitted by Great-West in September 1978) describing the self-funding program had yet been developed. Prior to May 1, 1979, Trust Company and Great-West had agreed that the benefit terms of the existing plan would not be altered by the changeover to self-funding, and that the benefit provisions in the Northwestern plan document would continue to govern all determinations relating to employee coverage, benefits and payments, with only two exceptions (neither of which is relevant to this case).

The Northwestern plan document contained a provision relating to offsets to benefits under the Plan which provided that a Plan participant's benefits were to be reduced by "income from other sources" including (as interpreted by the District Court below) mili-

tary retirement pay and Social Security benefits.[1] When applied to Petitioner, these "offsets" greatly exceeded $1,770 per month, which was the maximum amount of monthly benefits for which Petitioner would have been eligible under the Plan, had he been receiving no "income from other sources."

The pages from the Northwestern plan document defining offsets for income from other sources apparently were inadvertently omitted from the attachments to a document entitled "Application for Group Insurance" (hereinafter the "Application") submitted by Trust Company to Great-West in connection with the changeover to the Great-West self-funding mechanism. The Application does contain references to "income from other sources," but that term is not defined within the Application itself. At no time prior to Petitioner's retirement due to his total disability was he ever provided with a copy of the Application, nor was he even aware of its existence. Petitioner saw the Application for the first time only after this litigation commenced.

The decision to change the funding of the Plan from an insured plan to a self-funded arrangement was a contractual matter between Trust Company and Great-West. The contracting parties agreed that the benefit provisions of the existing Plan document would

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[1] In the courts below, Petitioner contended that the offset provisions of the Northwestern plan document should be interpreted in such a way that his receipt of military retirement and disability pay did not have the effect of reducing his Plan benefits. Both the District Court and the Eleventh Circuit rejected Petitioner's argument on this point, however, and Petitioner has not raised it as an issue in his petition.

continue in effect (with the two exceptions previously mentioned which are not relevant to this case). The affidavits of all parties to the negotiations established that the contracting parties (Trust Company and Great-West) were in complete agreement as of May 1, 1979 and at all times thereafter that the Northwestern plan document's benefit offset provisions would continue in effect. Petitioner was never informed that any other document or any other benefit or offset provision would apply.

As of May 1, 1979 and at all relevant times thereafter, it is undisputed that there was a complete meeting of the minds between Trust Company and Great-West with regard to the provisions of the Plan; the agreement was that the existing Northwestern plan document's benefit provisions (including the offsets for income from other sources) would continue to apply. At no time prior to his becoming totally disabled was Petitioner ever provided with any document or any communication stating or suggesting that the Northwestern plan document benefit and offset provisions were no longer in effect.

REASONS FOR DENYING THE WRIT

Summary of Argument

The writ should be denied because the considerations listed in Rule 17.1 of the Rules of this Court are not present in this case. There are no special or important reasons for granting the writ. No important question of federal law is involved. There exists no conflict between the decision below and the decision of any

other federal court of appeals or of this Court, and Petitioner has not suggested that any such conflict exists. As the Eleventh Circuit Court of Appeals recognized in affirming the District Court's decision without opinion, an opinion in the case would have no precedential value with regard to any issue of federal constitutional or statutory significance.

In addition, the writ should be denied because the decision below was clearly correct on the merits and was not contrary to ERISA, the United States Constitution, or any applicable decisions of this Court or any federal appellate court. The Petitioner has mischaracterized the holding below by implying that the Eleventh Circuit and the District Court concluded that the Georgia parol evidence rule "superseded" ERISA so that a plan required to be in writing under ERISA need not actually be entirely in writing. To the contrary, the courts below held only that an employer's ERISA plan need not be contained solely within the confines of a *single document* and that undisputed parol evidence could be used to determine which documents constituted the entire plan. The result below was especially appropriate because there was no factual dispute over the intent of the contracting parties and no plan documents provided to Petitioner while he was an employee were inconsistent with the benefit provisions which Respondents believed and the courts below found to be part of the Plan. Both courts below correctly rejected Petitioner's position and Respondent Great-West respectfully submits that there is no reason for this Court to grant the petition for writ of certiorari.

ARGUMENT

I. None of the Considerations of Rule 17 pertaining to Review on Certiorari are Present in this Case.

As stated in Rule 17.1 of this Court's Rules, a review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such reasons are present in this case. The decision of the Eleventh Circuit Court of Appeals affirming without opinion the District Court's decision is not in conflict with any decision of any other federal court of appeals, nor does it conflict with any decisions of this Court, nor does it decide an important question of federal law which should be settled by this Court.

In an attempt to create the appearance of an important federal issue in this case, Petitioner has stated his "question for review" in a way that mischaracterizes the decisions of the District and Circuit courts below by suggesting that those decisions were based on an allegedly erroneous legal conclusion with regard to an issue which was not even involved in those decisions. Even a cursory review of the District Court opinion establishes that the Court did not hold that the Georgia parol evidence rule "supersedes" ERISA, as suggested by Petitioner's question for review. Moreover, contrary to the impression created by Petitioner, the respective courts below did not hold that provisions of an employee benefit plan covered by ERISA may be created or added to a plan by parol evidence notwithstanding ERISA's requirement that plans be "in writing", but held only that parol evidence could be and was prop-

erly used to determine which written provisions of which documents together constituted the Plan.[2]

The District Court undoubtedly found the particular facts of the case to be very significant in deciding that parol evidence could be used to help determine which provisions of which documents constituted the Plan, where the undisputed intent of the parties in setting up the Plan was to include in it the provisions now sought to be avoided by Petitioner. First, as the District Court held, there was no factual dispute that the contracting parties (Great-West and Trust Company) who negotiated and implemented the switch to the self-funding plan mechanism at all times intended to include the benefit offset provisions contained in the Northwestern plan document in the Plan that became effective May 1, 1979. Second, Petitioner has never contended that any benefit offset provisions inconsistent with those in the Northwestern plan document were communicated to him while he was an employee of Trust Company. Third, as is clear from the District Court's opinion, the "Application for Group Insur-

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[2] In the courts below, Petitioner argued that the Georgia parol evidence rules should be applied to preclude consideration of extrinsic evidence concerning the intent of the parties to include the Northwestern plan document's benefit offset provisions in the Plan effective May 1, 1979. In fact, Petitioner contended below, and continues to maintain, that the permissible use of parol evidence is more limited under Georgia law than in most states. Petition at 23. Having been unsuccessful on this issue in both courts below, however, Petitioner has reversed his field and now argues that under the supersedure provision of ERISA (29 U.S.C. § 1144) the District Court was *prohibited* from considering the Georgia parol evidence rule in determining whether extrinsic evidence could be admitted to identify which documents constituted the Plan.

ance" which petitioner contends constituted the *entire* plan document was obviously incomplete on its face. In fact, the Application contained certain references to "income from other sources" but did not at any point define or explain what that term meant. Fourth, the benefit offset provisions which the courts below found to be part of the Plan were at all relevant times included in writing in the documents which Trust Company and Great-West believed to constitute the plan documents.

In view of the unusual controlling facts in the case, the District Court's decision (or a decision by this Court) is unlikely to have any significant precedential value with regard to any important issue of federal or state law. In fact, the Eleventh Circuit Court of Appeals expressly recognized as much by affirming the District Court's decision under the Circuit's rule which allows affirmance without opinion if the Court determines that "no error of law appears and an opinion would have no precedential value, . . ." Rules of the U.S. Court of Appeals for the Eleventh Circuit, Rule 25 (page A-1 of Appendix to petition).

II. The Decisions of the District Court and Court of Appeals are Correct and Do Not Contravene either the Specific Provisions of or the Policies Underlying ERISA.

The District Court found that the terms of the Plan were contained in Trust Company's written Application to Great-West, Great-West's letter acknowledging the Application and the prior insurance-funded Northwestern plan document. The District Court's approach

in incorporating each of these documents into the Plan accurately reflected the intent of the parties responsible for devising and implementing the Plan. In both the District Court and Court of Appeals, Petitioner unsuccessfully contended that, because the "Application for Group Insurance" from Trust Company to Great-West did not contain any provisions describing benefit offsets for income from other sources, the Plan should be interpreted as not containing such provisions, notwithstanding the undisputed intent of the parties and the fact that none of the parties ever believed that the Application contained all of the Plan provisions.

The District Court correctly held that ERISA does not require that all relevant provisions of an employee benefit plan must be contained in a single written document. As stated in the District Court opinion:

> "While it is true that 29 U.S.C. § 1102(a)(1) requires that every employee benefit plan 'shall be established and maintained pursuant to a written instrument,' the Court has found no authority that states that this written instrument must be one all-inclusive document. Indeed, the legislative history indicates that Congress contemplated the possibility of more than one writing constituting an ERISA plan. The conference committee report states: 'A written plan is to be required in order that every employee may, on examining the *plan documents*, determine exactly what his rights and obligations are under the

plan.' 1974 U.S. Code Cong. & Ad. News 4639, 5077-78 (emphasis added)."

Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F. Supp. 511, 519 (N.D. Ga. 1981).

The District Court properly used extrinsic evidence in determining *which* documents constituted the Plan, and after having done that, it used those documents to determine the merits of Petitioner's claims. Such an application of parol evidence in no way violates the requirements contained in 29 U.S.C. §1102. In fact, Petitioner has never identified *any* ERISA provision that supports his rather unusual position that a document (the "Application") should be held to contain *all* of the terms of the Plan despite the fact that it was never intended by any of the parties to reflect the Plan provisions.

The District Court properly found that the terms of the Plan were evidenced both by the Application and by provisions contained in the Northwestern plan document. In so doing, the District Court applied well-established rules of contract interpretation (relying on both Georgia and Federal case law) by permitting the use of extrinsic evidence to determine what documents the parties intended to constitute their agreement. As stated by the Fifth Circuit Court of Appeals in *Carolina Metal Products Corp. v. Larson*, 389 F.2d 490 (1968):

"[N]o rule bars 'parol evidence' or any other relevant evidence for the purpose of determining whether the parties have agreed upon the writing as

> a complete and accurate statement of what is agreed upon between them."

389 F.2d at 493. *See also Vanston v. Connecticut General Life Insurance Co.*, 482 F.2d 337, 341 (5th Cir. 1973).

In determining whether the parol evidence rule bars the introduction of evidence concerning the intentions of the parties, the first question is whether the writing fully states the agreement of the parties so as to be an integration of the parties' understanding:

> "To answer this question a court should consider the writing as well as the circumstances surrounding its execution, . . . and parol and extrinsic evidence may be used in making this determination."

Brown v. Financial Service Corporation, International, 489 F.2d 144, 149 (5th Cir. 1974).

The District Court, with the aid of undisputed parol evidence, correctly found that the *written* benefit offset provisions of the Northwestern document were part of the *written* Plan. By so doing, the District Court found the Plan's provisions to be in agreement with the undisputed intent of the contracting parties. There having been no violation of the ERISA requirement that all elements of the Plan be maintained in writing, there is no basis for Petitioner's contention that the District Court's admission of parol evidence to determine which documents constitute the Plan "supersedes" ERISA in violation of 29 U.S.C. § 1144.

Petitioner's contention that allowing the result below to stand would somehow lead to a "significant ero-

sion" of ERISA's protections is similarly groundless. Not only was there an undisputed intent of the contracting parties to incorporate the Northwestern plan document's benefit offset provisions into the Plan, but Petitioner also acknowledges that prior to his retirement from Trust Company "he had no reason to expect disability benefits which were not subject to the offset provisions of the Northwestern plan." Petition at 26. Moreover, the single document (the Application) which Petitioner contends constitutes the *entire* integrated plan document was *never* intended by the parties to contain all of the Plan's provisions, and was incomplete on its face. Certainly, the purposes of ERISA are best served, both as to Petitioner and other plan participants, by enforcing a provision agreed upon by the contracting parties and contained in the writings which at all relevant times were considered by the parties to contain the Plan provisions.

Respondent Great-West submits that the result reached by the courts below was demanded by the applicable rules of contract interpretation and is entirely consistent with both the specific provisions and the purpose of ERISA.

CONCLUSION

Respondent The Great-West Life Assurance Company respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

J. D. FLEMING, JR.

Counsel of Record for Respondent
The Great-West Life Assurance
Company

SUTHERLAND, ASBILL & BRENNAN
3100 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-8700